

Assembly Bill No. 641

Passed the Assembly September 8, 2011

Chief Clerk of the Assembly

Passed the Senate September 7, 2011

Secretary of the Senate

This bill was received by the Governor this _____ day
of _____, 2011, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to amend Sections 1423, 1424, 1424.5, 1428, 1428.2, and 1429 of, and to repeal Section 1417.5 of, the Health and Safety Code, and to add Section 14015.12 to the Welfare and Institutions Code, relating to long-term care.

LEGISLATIVE COUNSEL'S DIGEST

AB 641, Feuer. Long-term care.

The existing Long-Term Care, Health, Safety, and Security Act of 1973 establishes an inspection and reporting system and a provisional licensing mechanism, administered by the State Department of Public Health, to ensure that long-term health care facilities, as defined, are in compliance with state statutes, regulations, and federal standards pertaining to patient care. The act requires the department, if it determines that a violation of any state or federal law or regulation relating to the operation or maintenance of the facility warrants the issuance of a citation, to take specified actions regarding federal enforcement remedies and citations. The act prohibits the issuance of both a citation pursuant to state laws and the recommendation that a federal civil monetary penalty be imposed.

This bill would delete this prohibition.

The act establishes a citation and appeals process, that includes a citation review conference.

This bill would repeal the citation review conference process and make conforming changes.

Existing law provides for the Medi-Cal program, which is administered by the State Department of Health Care Services, under which qualified low-income individuals receive health care services. The Medi-Cal program is, in part, governed and funded by federal Medicaid Program provisions. Existing law requires the State Department of Health Care Services to consider whether an undue hardship, as described, exists prior to finding that an applicant or recipient is subject to a period of ineligibility for medical assistance for home and facility care.

This bill would require the State Department of Health Care Services to also consider whether an undue hardship exists for an

applicant for, or recipient of, home and facility care under additional circumstances relating to the transfer of assets.

The people of the State of California do enact as follows:

SECTION 1. Section 1417.5 of the Health and Safety Code is repealed.

SEC. 2. Section 1423 of the Health and Safety Code is amended to read:

1423. (a) If upon inspection or investigation the director determines that any nursing facility is in violation of any state or federal law or regulation relating to the operation or maintenance of the facility, or determines that any other long-term health care facility is in violation of any statutory provision or regulation relating to the operation or maintenance of the facility, the director shall promptly, but not later than 24 hours, excluding Saturday, Sunday, and holidays, after the director determines or has reasonable cause to determine that an alleged violation has occurred, issue a notice to correct the violation and of intent to issue a citation to the licensee. Before completing the investigation and making the determination whether to issue a citation, the department shall hold an exit conference with the licensee to identify the potential for issuing a citation for any violation, discuss investigative findings, and allow the licensee to provide the department with additional information related to the violation. The department shall consider this additional information, in conjunction with information from the inspection or investigation, in determining whether to issue a citation, or whether other action would be appropriate. If the department determines that the violation warrants the issuing of a citation and an exit conference has been completed it shall either:

(1) Recommend the imposition of a federal enforcement remedy or remedies on a nursing facility in accordance with federal law; or

(2) Issue a citation pursuant to state licensing laws, and if the facility is a nursing facility, may recommend the imposition of a federal enforcement remedy.

A state citation shall be served upon the licensee within three days after completion of the investigation, excluding Saturday, Sunday, and holidays, unless the licensee agrees in writing to an

extension of time. Service shall be effected either personally or by registered or certified mail. A copy of the citation shall also be sent to each complainant. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the statutory provision, standard, rule, or regulation alleged to have been violated, the particular place or area of the facility in which it occurred, as well as the amount of any proposed assessment of a civil penalty. The name of any patient jeopardized by the alleged violation shall not be specified in the citation in order to protect the privacy of the patient. However, at the time the licensee is served with the citation, the licensee shall also be served with a written list of each of the names of the patients alleged to have been jeopardized by the violation, that shall not be subject to disclosure as a public record. The citation shall fix the earliest feasible time for the elimination of the condition constituting the alleged violation, when appropriate.

(b) Where no harm to patients, residents, or guests has occurred, a single incident, event, or occurrence shall result in no more than one citation for each statute or regulation violated.

(c) No citation shall be issued for a violation that has been reported by the licensee to the state department, or its designee, as an “unusual occurrence,” if all of the following conditions are met:

(1) The violation has not caused harm to any patient, resident, or guest, or significantly contributed thereto.

(2) The licensee has promptly taken reasonable measures to correct the violation and to prevent a recurrence.

(3) The unusual occurrence report was the first source of information reported to the state department, or its designee, regarding the violation.

SEC. 3. Section 1424 of the Health and Safety Code, as amended by Section 6 of Chapter 4 of the First Extraordinary Session of the Statutes of 2011, is amended to read:

1424. Citations issued pursuant to this chapter shall be classified according to the nature of the violation and shall indicate the classification on the face thereof.

(a) In determining the amount of the civil penalty, all relevant facts shall be considered, including, but not limited to, the following:

- (1) The probability and severity of the risk that the violation presents to the patient's or resident's mental and physical condition.
- (2) The patient's or resident's medical condition.
- (3) The patient's or resident's mental condition and his or her history of mental disability or disorder.
- (4) The good faith efforts exercised by the facility to prevent the violation from occurring.
- (5) The licensee's history of compliance with regulations.

(b) Relevant facts considered by the department in determining the amount of the civil penalty shall be documented by the department on an attachment to the citation and available in the public record. This requirement shall not preclude the department or a facility from introducing facts not listed on the citation to support or challenge the amount of the civil penalty in any proceeding set forth in Section 1428.

(c) Class "AA" violations are violations that meet the criteria for a class "A" violation and that the state department determines to have been a direct proximate cause of death of a patient or resident of a long-term health care facility. Except as provided in Section 1424.5, a class "AA" citation is subject to a civil penalty in the amount of not less than five thousand dollars (\$5,000) and not exceeding twenty-five thousand dollars (\$25,000) for each citation. In any action to enforce a citation issued under this subdivision, the state department shall prove all of the following:

- (1) The violation was a direct proximate cause of death of a patient or resident.
- (2) The death resulted from an occurrence of a nature that the regulation was designed to prevent.
- (3) The patient or resident suffering the death was among the class of persons for whose protection the regulation was adopted.

If the state department meets this burden of proof, the licensee shall have the burden of proving that the licensee did what might reasonably be expected of a long-term health care facility licensee, acting under similar circumstances, to comply with the regulation. If the licensee sustains this burden, then the citation shall be dismissed.

Except as provided in Section 1424.5, for each class "AA" citation within a 12-month period that has become final, the state department shall consider the suspension or revocation of the facility's license in accordance with Section 1294. For a third or

subsequent class “AA” citation in a facility within that 12-month period that has been sustained, the state department shall commence action to suspend or revoke the facility’s license in accordance with Section 1294.

(d) Class “A” violations are violations which the state department determines present either (1) imminent danger that death or serious harm to the patients or residents of the long-term health care facility would result therefrom, or (2) substantial probability that death or serious physical harm to patients or residents of the long-term health care facility would result therefrom. A physical condition or one or more practices, means, methods, or operations in use in a long-term health care facility may constitute a class “A” violation. The condition or practice constituting a class “A” violation shall be abated or eliminated immediately, unless a fixed period of time, as determined by the state department, is required for correction. Except as provided in Section 1424.5, a class “A” citation is subject to a civil penalty in an amount not less than one thousand dollars (\$1,000) and not exceeding ten thousand dollars (\$10,000) for each and every citation.

If the state department establishes that a violation occurred, the licensee shall have the burden of proving that the licensee did what might reasonably be expected of a long-term health care facility licensee, acting under similar circumstances, to comply with the regulation. If the licensee sustains this burden, then the citation shall be dismissed.

(e) Except as provided in paragraph (4) of subdivision (a) of Section 1424.5, class “B” violations are violations that the state department determines have a direct or immediate relationship to the health, safety, or security of long-term health care facility patients or residents, other than class “AA” or “A” violations. Unless otherwise determined by the state department to be a class “A” violation pursuant to this chapter and rules and regulations adopted pursuant thereto, any violation of a patient’s rights as set forth in Sections 72527 and 73523 of Title 22 of the California Code of Regulations, that is determined by the state department to cause or under circumstances likely to cause significant humiliation, indignity, anxiety, or other emotional trauma to a patient is a class “B” violation. A class “B” citation is subject to a civil penalty in an amount not less than one hundred dollars

(\$100) and not exceeding one thousand dollars (\$1,000) for each and every citation. A class “B” citation shall specify the time within which the violation is required to be corrected. If the state department establishes that a violation occurred, the licensee shall have the burden of proving that the licensee did what might reasonably be expected of a long-term health care facility licensee, acting under similar circumstances, to comply with the regulation. If the licensee sustains this burden, then the citation shall be dismissed.

In the event of any citation under this paragraph, if the state department establishes that a violation occurred, the licensee shall have the burden of proving that the licensee did what might reasonably be expected of a long-term health care facility licensee, acting under similar circumstances, to comply with the regulation. If the licensee sustains this burden, then the citation shall be dismissed.

(f) (1) Any willful material falsification or willful material omission in the health record of a patient of a long-term health care facility is a violation.

(2) “Willful material falsification,” as used in this section, means any entry in the patient health care record pertaining to the administration of medication, or treatments ordered for the patient, or pertaining to services for the prevention or treatment of decubitus ulcers or contractures, or pertaining to tests and measurements of vital signs, or notations of input and output of fluids, that was made with the knowledge that the records falsely reflect the condition of the resident or the care or services provided.

(3) “Willful material omission,” as used in this section, means the willful failure to record any untoward event that has affected the health, safety, or security of the specific patient, and that was omitted with the knowledge that the records falsely reflect the condition of the resident or the care or services provided.

(g) Except as provided in subdivision (a) of Section 1424.5, a violation of subdivision (f) may result in a civil penalty not to exceed ten thousand dollars (\$10,000), as specified in paragraphs (1) to (3), inclusive.

(1) The willful material falsification or willful material omission is subject to a civil penalty of not less than two thousand five hundred dollars (\$2,500) or more than ten thousand dollars (\$10,000) in instances where the health care record is relied upon

by a health care professional to the detriment of a patient by affecting the administration of medications or treatments, the issuance of orders, or the development of plans of care. In all other cases, violations of this subdivision are subject to a civil penalty not exceeding two thousand five hundred dollars (\$2,500).

(2) Where the penalty assessed is one thousand dollars (\$1,000) or less, the violation shall be issued and enforced, except as provided in this subdivision, in the same manner as a class “B” violation, and shall include the right of appeal as specified in Section 1428. Where the assessed penalty is in excess of one thousand dollars (\$1,000), or for skilled nursing facilities or intermediate care facilities as specified in paragraphs (1) and (2) of subdivision (a) of Section 1418, in excess of two thousand dollars (\$2,000), the violation shall be issued and enforced, except as provided in this subdivision, in the same manner as a class “A” violation, and shall include the right of appeal as specified in Section 1428.

Nothing in this section shall be construed as a change in previous law enacted by Chapter 11 of the Statutes of 1985 relative to this paragraph, but merely as a clarification of existing law.

(3) Nothing in this subdivision shall preclude the state department from issuing a class “A” or class “B” citation for any violation that meets the requirements for that citation, regardless of whether the violation also constitutes a violation of this subdivision. However, no single act, omission, or occurrence may be cited both as a class “A” or class “B” violation and as a violation of this subdivision.

(h) Where the licensee has failed to post the notices as required by Section 9718 of the Welfare and Institutions Code in the manner required under Section 1422.6, the state department shall assess the licensee a civil penalty in the amount of one hundred dollars (\$100) for each day the failure to post the notices continues. Where the total penalty assessed is less than two thousand dollars (\$2,000), the violation shall be issued and enforced in the same manner as a class “B” violation, and shall include the right of appeal as specified in Section 1428. Where the assessed penalty is equal to or in excess of two thousand dollars (\$2,000), the violation shall be issued and enforced in the same manner as a class “A” violation and shall include the right of appeal as specified in Section 1428. Any fines collected pursuant to this subdivision shall be used to

fund the costs incurred by the California Department of Aging in producing and posting the posters.

(i) The director shall prescribe procedures for the issuance of a notice of violation with respect to violations having only a minimal relationship to patient safety or health.

(j) The department shall provide a copy of all citations issued under this section to the affected residents whose treatment was the basis for the issuance of the citation, to the affected residents' designated family member or representative of each of the residents, and to the complainant if the citation was issued as a result of a complaint.

(k) Nothing in this section is intended to change existing statutory or regulatory requirements governing the ability of a licensee to contest a citation pursuant to Section 1428.

(l) The department shall ensure that district office activities performed under Sections 1419 to 1424, inclusive, are consistent with the requirements of these sections and all applicable laws and regulations. To ensure the integrity of these activities, the department shall establish a statewide process for the collection of postsurvey evaluations from affected facilities.

SEC. 4. Section 1424.5 of the Health and Safety Code, as amended by Section 7 of Chapter 4 of the First Extraordinary Session of the Statutes of 2011, is amended to read:

1424.5. (a) In lieu of the fines specified in subdivisions (c), (d), (e), and (g) of Section 1424, fines imposed on skilled nursing facilities or intermediate care facilities, as specified in paragraphs (1) and (2) of subdivision (a) of Section 1418, shall be as follows:

(1) A class "AA" citation is subject to a civil penalty in an amount not less than twenty-five thousand dollars (\$25,000) and not exceeding one hundred thousand dollars (\$100,000) for each and every citation. For a second or subsequent class "AA" citation in a skilled nursing facility or intermediate care facility within a 24-month period, the state department shall commence action to suspend or revoke the facility's license in accordance with Section 1294.

(2) A class "A" citation is subject to a civil penalty in an amount not less than two thousand dollars (\$2,000) and not exceeding twenty thousand dollars (\$20,000) for each and every citation.

(3) Any "willful material falsification" or "willful material omission," as those terms are defined in subdivision (f) of Section

1424, in the health record of a resident is subject to a civil penalty in an amount not less than two thousand dollars (\$2,000) and not exceeding twenty thousand dollars (\$20,000) for each and every citation.

(4) A class “B” citation is subject to a civil penalty in an amount not less than one hundred dollars (\$100) and not exceeding two thousand dollars (\$2,000) for each and every citation. Class “B” violations are violations that the state department determines have a direct or immediate relationship to the health, safety, or security of long-term health care facility patients or residents, other than class “AA” or “A” violations. Unless otherwise determined by the state department to be a class “A” violation pursuant to this chapter and rules and regulations adopted pursuant thereto, any violation of a patient’s rights as set forth in Sections 72527 and 73523 of Title 22 of the California Code of Regulations, that is determined by the state department to cause, or under circumstances to be likely to cause, significant humiliation, indignity, anxiety, or other emotional trauma to a patient is a class “B” violation. A class “B” citation shall specify the time within which the violation is required to be corrected. If the state department establishes that a violation occurred, the licensee shall have the burden of proving that the licensee did what might reasonably be expected of a long-term health care facility licensee, acting under similar circumstances, to comply with the regulation. If the licensee sustains this burden, then the citation shall be dismissed.

(b) A licensee may, in lieu of contesting a class “AA” or class “A” citation pursuant to Section 1428, transmit to the state department, the minimum amount specified by law, or 65 percent of the amount specified in the citation, whichever is greater, for each violation, within 30 business days after the issuance of the citation.

SEC. 5. Section 1428 of the Health and Safety Code is amended to read:

1428. (a) If the licensee desires to contest a citation or the proposed assessment of a civil penalty therefor, the licensee shall use the processes described in subdivisions (b) and (c) for classes “AA,” “A,” or “B” citations.

(b) If a licensee intends to contest a class “AA” or a class “A” citation, the licensee shall inform the director in writing, within 15 business days of the service of the citation of the licensee’s

intent to adjudicate the validity of the citation in the superior court in the county in which the long-term health care facility is located. In order to perfect a judicial appeal of a contested citation, a licensee shall file a civil action in the superior court in the county in which the long-term health care facility is located. The action shall be filed no later than 90 calendar days after a licensee notifies the director that he or she intends to contest the citation, and served not later than 90 days after filing. Notwithstanding any other provision of law, a licensee prosecuting a judicial appeal shall file and serve a case management statement pursuant to Rule 212 of the California Rules of Court within six months after the department files its answer in the appeal. Notwithstanding subdivision (d), the court shall dismiss the appeal upon motion of the department if the case management statement is not filed by the licensee within the period specified. The court may affirm, modify, or dismiss the citation, the level of the citation, or the amount of the proposed assessment of the civil penalty.

(c) If a licensee desires to contest a class “B” citation, the licensee shall, within 15 working days after service of the citation, notify the director or the director’s designee that he or she wishes to appeal the citation through the procedures set forth in Section 100171 or elects to submit the matter to binding arbitration in accordance with subdivision (d). The administrative law judge may affirm, modify, or dismiss the citation or the proposed assessment of a civil penalty. The licensee may choose to have his or her appeal heard by the administrative law judge or submit the matter to binding arbitration by notifying the director in writing within 15 business days of the service of the citation.

(d) If a licensee is dissatisfied with the decision of the administrative law judge, the licensee may, in lieu of seeking judicial review of the decision as provided in Section 1094.5 of the Code of Civil Procedure, elect to submit the matter to binding arbitration by filing, within 60 days of its receipt of the decision, a request for arbitration with the American Arbitration Association. The parties shall agree upon an arbitrator designated from the American Arbitration Association in accordance with the association’s established rules and procedures. The arbitration hearing shall be set within 45 days of the election to arbitrate, but in no event less than 28 days from the date of selection of an arbitrator. The arbitration hearing may be continued up to 15

additional days if necessary at the arbitrator's discretion. Except as otherwise specifically provided in this subdivision, the arbitration hearing shall be conducted in accordance with the American Arbitration Association's established rules and procedures. The arbitrator shall determine whether the licensee violated the regulation or regulations cited by the department, and whether the citation meets the criteria established in Sections 1423 and 1424. If the arbitrator determines that the licensee has violated the regulation or regulations cited by the department, and that the class of the citation should be upheld, the proposed assessment of a civil penalty shall be affirmed, subject to the limitations established in Section 1424. The licensee and the department shall each bear its respective portion of the cost of arbitration. A resident, or his or her designated representative, or both, may make an oral or written statement regarding the citation, at any arbitration hearing to which the matter has been submitted.

(e) If an appeal is prosecuted under this section, including an appeal taken in accordance with Section 100171, the department shall have the burden of establishing by a preponderance of the evidence that (1) the alleged violation did occur, (2) the alleged violation met the criteria for the class of citation alleged, and (3) the assessed penalty was appropriate. The department shall also have the burden of establishing by a preponderance of the evidence that the assessment of a civil penalty should be upheld. If a licensee appeals a contested citation or the assessment of a civil penalty, no civil penalty shall be due and payable unless and until the appeal is terminated in favor of the department.

(f) In assessing the civil penalty for a violation, all relevant facts shall be considered, including, but not limited to, all of the following:

(1) The probability and severity of the risk which the violation presents to the patient's or resident's mental and physical condition.

(2) The patient's or resident's medical condition.

(3) The patient's or resident's mental condition and his or her history of mental disability.

(4) The good faith efforts exercised by the facility to prevent the violation from occurring.

(5) The licensee's history of compliance with regulations.

(g) Except as otherwise provided in this subdivision, an assessment of civil penalties for a class "A" or class "B" violation

shall be trebled and collected for a second and subsequent violation for which a citation of the same class was issued within any 12-month period. Trebling shall occur only if the first citation issued within the 12-month period was issued in the same class, a civil penalty was assessed, and a plan of correction was submitted for the previous same-class violation occurring within the period, without regard to whether the action to enforce the previous citation has become final. However, the increment to the civil penalty required by this subdivision shall not be due and payable unless and until the previous action has terminated in favor of the department.

If the class “B” citation is issued for a patient’s rights violation, as defined in subdivision (e) of Section 1424, it shall not be trebled unless the department determines the violation has a direct or immediate relationship to the health, safety, security, or welfare of long-term health care facility residents.

(h) The director shall prescribe procedures for the issuance of a notice of violation with respect to violations having only a minimal relationship to safety or health.

(i) Actions brought under this chapter shall be set for trial at the earliest possible date and shall take precedence on the court calendar over all other cases except matters to which equal or superior precedence is specifically granted by law. Times for responsive pleading and for hearing the proceeding shall be set by the judge of the court with the object of securing a decision as to subject matters at the earliest possible time.

(j) If the citation is dismissed, the department shall take action immediately to ensure that the public records reflect in a prominent manner that the citation was dismissed.

(k) Penalties paid on violations under this chapter shall be applied against the department’s accounts to offset any costs incurred by the state pursuant to this chapter. Any costs or penalties assessed pursuant to this chapter shall be paid within 30 days of the date the decision becomes final. If a facility does not comply with this requirement, the state department shall withhold any payment under the Medi-Cal program until the debt is satisfied. No payment shall be withheld if the department determines that it would cause undue hardship to the facility or to patients or residents of the facility.

(l) The amendments made to subdivisions (a) and (c) of this section by Chapter 84 of the Statutes of 1988, to extend the number of days allowed for the provision of notification to the director, do not affect the right, that is also contained in those amendments, to request judicial relief from these time limits.

(m) If a licensee exercises its right to a citation review conference prior to January 1, 2012, the citation review conference and all notices, reviews, and appeals thereof shall be conducted pursuant to this section as it read on December 31, 2011.

SEC. 6. Section 1428.2 of the Health and Safety Code is amended to read:

1428.2. In the case of a class “A” or class “AA” citation issued to a long-term health care facility which is appealed, the citation shall expire and have no further legal effect, if the Attorney General has not filed an action in the court of competent jurisdiction, within one year from the date the facility notifies the State Department of Public Health of its intent to contest the citation in court.

SEC. 7. Section 1429 of the Health and Safety Code is amended to read:

1429. (a) Each class “AA” and class “A” citation specified in subdivisions (c) and (d) of Section 1424 that is issued, or a copy or copies thereof, shall be prominently posted for 120 days. The citation or copy shall be posted in a place or places in plain view of the patients or residents in the long-term health care facility, persons visiting those patients or residents, and persons who inquire about placement in the facility.

(1) The citation shall be posted in at least the following locations in the facility:

(A) An area accessible and visible to members of the public.

(B) An area used for employee breaks.

(C) An area used by residents for communal functions, such as dining, resident council meetings, or activities.

(2) The citation, along with a cover sheet, shall be posted on a white or light-colored sheet of paper, at least 8 ½ by 11 inches in size, that includes all of the following information:

(A) The full name of the facility, in a clear and easily readable font in at least 28-point type.

(B) The full address of the facility, in a clear and easily readable font in at least 20-point type.

(C) Whether the citation is class “AA” or class “A.”

(3) The facility may post the plan of correction.

(4) The facility may post a statement disputing the citation or a statement showing the appeal status, or both.

(5) The facility may remove and discontinue the posting required by this section if the citation is withdrawn or dismissed by the department.

(b) Each class “B” citation specified in subdivision (e) of Section 1424 that is issued pursuant to this section and that has become final, or a copy or copies thereof, shall be retained by the licensee at the facility cited until the violation is corrected to the satisfaction of the department. Each citation shall be made promptly available by the licensee for inspection or examination by any member of the public who so requests. In addition, every licensee shall post in a place or places in plain view of the patient or resident in the long-term health care facility, persons visiting those patients or residents, and persons who inquire about placement in the facility, a prominent notice informing those persons that copies of all final uncorrected citations issued by the department to the facility will be made promptly available by the licensee for inspection by any person who so requests.

(c) A violation of this section shall constitute a class “B” violation, and shall be subject to a civil penalty in the amount of one thousand dollars (\$1,000), as provided in subdivision (e) of Section 1424. Notwithstanding Section 1290, a violation of this section shall not constitute a crime. Fines imposed pursuant to this section shall be deposited into the State Health Facilities Citation Penalties Account, created pursuant to Section 1417.2.

SEC. 8. Section 14015.12 is added to the Welfare and Institutions Code, to read:

14015.12. (a) For the purposes of this section, the following definitions shall apply:

(1) “Opposite-sex spouse” means a person of the opposite sex who is legally married to an applicant for, or recipient of, home and facility care.

(2) “Registered domestic partner” means a person that meets the requirements of Section 297 of the Family Code and with whom the applicant for, or recipient of, home and facility care shares the common residence.

(3) “Same-sex spouse” means a person of the same sex who is legally married to an applicant for, or recipient of, home and facility care.

(b) In addition to the requirements of Section 14015.1, the department shall consider, at initial application or redetermination, whether an undue hardship, as described in subdivision (c), exists prior to finding that an applicant or recipient is subject to a period of ineligibility for medical assistance for home and facility care pursuant to this article. No person shall be subject to a period of ineligibility for medical assistance for home and facility care at the time of the initial application or redetermination if the department determines that an undue hardship exists.

(c) An undue hardship shall be found to exist under any of the following circumstances:

(1) The applicant for, or recipient of, home and facility care transferred all or any portion of his or her ownership interest in the shared principal residence to his or her same-sex spouse or registered domestic partner.

(2) (A) Subject to the requirements of subparagraph (B), the applicant for, or recipient of, home and facility care transferred his or her ownership interest in resources other than the shared principal residence to his or her same-sex spouse or registered domestic partner and the value of those resources does not exceed the value of resources that the individual could transfer to his or her same-sex spouse or registered domestic partner and does not exceed the community spouse resource allowance that would be available to that person if he or she was an opposite-sex spouse. When considering whether an undue hardship exists under this paragraph, the Medi-Cal eligibility determination rules applicable to resource evaluations for an applicant for, or recipient of, home and facility care and his or her opposite-sex spouse shall be used to determine the resources available to an applicant for, or recipient of, home and facility care and his or her same-sex spouse or registered domestic partner.

(B) If the value of the resources transferred exceeds the limit specified in subparagraph (A), the amount of resources transferred that meet the limit shall be subject to the undue hardship exception specified in subparagraph (A) and the amount of resources transferred in excess of the limit shall not be subject to an undue

hardship exception under this section and shall be considered a transfer of assets for less than fair market value.

(3) (A) Subject to the requirements of subparagraph (B), the applicant for, or recipient of, home and facility care transferred his or her income or right to receive income to his or her same-sex spouse or registered domestic partner and the amount of the transferred income does not exceed the amount of income that the individual could transfer to his or her same-sex spouse or registered domestic partner and does not exceed the maximum monthly spousal income allowance that would be available to that person if he or she was an opposite-sex spouse. When considering whether an undue hardship exists under this paragraph, the Medi-Cal eligibility determination rules applicable to income evaluations for an applicant for, or recipient of, home and facility care and his or her opposite-sex spouse shall be used to determine the income available to an applicant for, or recipient of, home and facility care and his or her same-sex spouse or registered domestic partner.

(B) If the amount of income transferred exceeds the limit specified in subparagraph (A), the amount of income transferred that meets the limit shall be subject to the undue hardship exception specified in subparagraph (A) and the amount of income transferred in excess of the limit shall not be subject to an undue hardship exception under this section and shall continue to be included in the applicant's or recipient's share of cost. To the extent that the excess income transferred was the applicant's or recipient's right to receive a future income stream and that transfer can be revoked, the applicant or recipient shall revoke the transfer. To the extent that the transferred income stream cannot be revoked, that future income stream shall be considered a transfer of assets for less than fair market value.

(d) This section shall be implemented pursuant to the requirements of Title XIX of the federal Social Security Act (42 U.S.C. Sec. 1396 et seq.) and any regulations adopted pursuant to that act.

(e) (1) The department shall submit a state plan amendment or seek other federal approval before implementing the undue hardship circumstances identified in this section. The department shall request, in the state plan amendment or other federal approval request, that the effective date of approval be retroactive to January 1, 2012.

(2) This section shall be implemented only if, and to the extent that, a state plan amendment is approved or other federal approval is obtained and federal financial participation is available.

(f) Notwithstanding Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, the department shall implement this section by means of all-county letters or similar instructions, without taking regulatory action.

SEC. 9. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

Approved _____, 2011

Governor